Submission No. 68

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Research Director
Agriculture and Environment Committee
Parliament House
BRISBANE QLD 4000

By email
aec@parliament.qld.gov.au

Dear Sir/Madam

Submission regarding Environmental Protection (Chain of Responsibility) Amendment Bill 2016

1. Introduction

1.1 Thank you for the opportunity to provide a submission on the Environmental Protection (Chain of Responsibility) Amendment Bill 2016 (**Bill**).

1.2 Baker & McKenzie is a global law firm with more than 4,200 locally admitted lawyers in 77 offices worldwide, including our Brisbane office which opened in September 2014. We have a market-leading environmental law practice, advising clients in Australia and across multiple jurisdictions on all aspects of domestic and international environmental and development law, in relation to day-to-day regulatory compliance and in the context of developments and transactions. This includes dealing with pollution incidents, environmental licensing, contaminated land, town planning, waste, hazardous substances and product regulation.

1.3 We have considered the amendments to the *Environmental Protection Act 1994* (Qld) (**EP Act**) proposed by the Bill, and our submissions are set out below.

2. Justification for Bill

2.1 We are generally supportive of the Bill's proposed amendments to the EP Act, in light of the problems faced by the Department of Environment and Heritage Protection (**EHP**) in enforcing environmental legal obligations where a project is in financial distress or is otherwise not meeting those obligations. In our view, neither the State nor the public should be left with significant undischarged environmental liability, where a company is not able or willing to comply with ongoing environmental obligations during periods of financial distress and/or when facilities are put into periods of suspension or closure.

2.2 The amendments are consistent with the 'polluter pays' principle, in that the polluter is still held primarily liable for compliance with its environmental obligations, to the extent that polluter exists. The 'polluter pays' principle is a well-established aspect of environmental regulatory policy, under which the entity that caused environmental damage (**first company**) should bear the costs of managing it to prevent damage to human health or the environment.

2.3 In our view, it is appropriate that EHP should have legal recourse to some entities within a first company's corporate circle which benefit financially from the environmentally relevant activities being carried out by the first company - particularly when the alternative is for the financial burden of complying with those obligations to fall to the State.

2.4 We also consider the amendments have a practical benefit in that they will incentivise investors in projects carrying out higher-risk environmental activities or with significant actual or potential contamination remediation or mining rehabilitation liability to:

(a) require that liability be better understood *at the time the corporate relationship is established* (e.g. at the time of financing), which in turn will incentivise first companies to better understand this liability themselves; and

(b) require the quantification of a project's actual and potential environmental liability to be assessed for accuracy regularly throughout *the life of the project* (or the entity's involvement with it).

2.5 It may also incentivise investors to seek more solid backing from a parent company to a first company, to ensure the parent company is first in line for 'related person' status (or at least has indemnified the investor accordingly) - promoting better and earlier understanding of a project's actual and potential environmental liability at parent company level as well as at the first company level.

2.6 We are also supportive of the provisions in the Bill extending EHP officer powers to enter property. These provisions appear necessary to ensure EHP's entry powers can be exercised even where an environmental authority is no longer in place for a site.

2.7 Finally, we believe that only by factoring in the real costs of environmental liability can the actual capital costs or projects be correctly assessed. This creates a more transparent marketplace.

3. Further comments

3.1 We note that the proposed amendments will have broad application, and will not be limited to (for example) companies already in financial distress, which have failed to comply with an EPO, or which are carrying out higher-risk environmentally relevant activities. We understand the nature of the problem which the Bill seeks to address requires that EHP's powers are adaptable and

applicable to a wide range of corporate relationships that may be relevant, and that inflexible or limited 'related persons' tests may constrain the effectiveness of the proposed changes by potentially enabling companies to modify their corporate relationships to fall outside the test, and by limiting the ability of these changes to cover new or innovative corporate structures.

3.2 We further note that this broad application may be considered to be warranted, given the risk of significant liability falling to the State, and is not entirely unprecedented in Australia's broader regulatory environment. The amendments may be considered to be analogous to federal and state-level tax avoidance laws. These laws allow the government to re-characterise schemes, attribute income of offshore entities to Australian residents or hold directors of companies personally liable when the company has failed to comply with its payment obligations, for example:

(a) the General Anti Avoidance Laws in Part IVA of the *Income Tax Assessment Act 1936* (Cth) (***ITAA 1936***), which entitles the Commissioner of Taxation to re-characterise schemes undertaken by taxpayers by reference to a hypothetical alternate of what would have happened if the transaction had not been undertaken with the dominant purpose to avoid tax. Analogous provisions are also found in Chapter 11 of the *Duties Act 2001* (Qld), with respect to the payment of duty under that Act;

(b) the Controlled Foreign Company (**CFC**) provisions in Part X of the *ITAA 1936* attribute certain income derived by the CFC to an Australian resident taxpayer and requires the amounts to be included in the taxpayer's assessable income. Broadly, CFC income will be attributed to an Australian resident who, together with associates, has a 10% or greater direct or indirect interest in a CFC;

(c) the Australian transferor trust rules in Division 6AAA Pt III of the *ITAA 1936* may subject the foreign income of resident Australian taxpayers to accruals taxation. Where a certain value is transferred to a non-resident trust, this amount is attributed to the Australian resident taxpayer, and the taxpayer must includes its share of the transferor trust income in its assessable income; and

(d) section 269 in Schedule 1 of the *Taxation Administration Act 1953* (Cth) contains a penalty regime for directors of a company that has failed to comply with certain payment obligations (for example, PAYG withholding amounts). Under this section, a director of the company is personally liable for the company's payment obligations. This penalty is automatically imposed, and is due and payable, at the end of the "due day" if the company is still under its payment obligation.

3.3 There may also be parallels between the amendments and various types of insolvency claw-back legislation, which enables recovery from holding

companies and other related parties in relation to misconduct in the operation of a company (see, e.g. sections 588M, 588V, 588FDA of the *Corporations Act 2001*).

3.4 We do note certain entities, such as contractors and employees, are not intended to be captured by the amendments. We suggest the Committee consider the merits of making this express in the legislation.

3.5 We also consider that major lending institutions in particular may determine there is an unacceptable level of risk in providing finance for certain Queensland-based projects due to uncertainty as to whether they may be considered 'related persons' at some time during the project's life. Such entities are currently not clearly excluded from the scope of possible 'related persons'.

3.6 The Committee may wish to consider the merits of an automatic carve-out for certain legitimate, arm's length lenders, such as any authorised deposit-taking institution that is not a shareholder of the borrower, from being considered to be a 'related person'. To give sufficient upfront comfort to these institutions the exemption could be, for example via an express exemption in the legislation, or a case-by-case assessment process with reference to clear and publicly available criteria (noting we would only be supportive of an additional approval process if the process was clear, such approvals were able to be sought and obtained on an urgent basis, and the details of the first company's relationship with the 'related person' was able to be kept confidential if requested).

3.7 Finally, regarding mining projects particularly, we suggest EHP may wish to consider:

(a) progressing as an urgent priority a review of the financial assurance system (we are aware the system has been the subject of various reviews in the past few years but that further work is required to finalise and implement the results of those reviews). The greater knowledge and understanding of technical considerations for mining rehabilitation which may result from these amendments may assist with this work; and

(b) offering greater incentives for mining companies to conduct progressive rehabilitation earlier in the mine plan, thereby reducing the risk of significant outstanding rehabilitation liability existing when a mine goes into financial distress or suspension/closure. For sites with significant ongoing environmental liability, a process for further incentivising progressive clean-up or remedial action during the productive project life may also have some merit.

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